In the Court of Appeals of the State of Alaska

Carlton W. Donnelly,
Appellant,

v.

State of Alaska,
Appellee.

Court of Appeals Nos. **A-13597** and **A-13598**

Order

Motion to Permit Withdrawal of Counsel

Date of Order: **11/3/2021**

Trial Court Case No. **3AN-11-13926CR**

Before: Wollenberg, Harbison, and Terrell, Judges

Carlton W. Donnelly is represented by the Alaska Public Defender Agency. The Agency, on behalf of Donnelly, previously filed three requests for extensions of time to file the opening brief in each of these appeals.

In Case No. A-13597, we granted the first two of these requests, allowing the Agency both a full 390-day extension under Court of Appeals Standing Order No. 12 and a second 150-day extension. But we denied the Agency's third request for an extension of time. At present, Donnelly's opening brief is due on November 5, 2021 — 540 days after the original filing deadline.

In Case No. A-13598, we similarly granted the Agency's first extension request, allowing a full 390-day extension under Standing Order No. 12. And we also granted, in part, the Agency's second extension request, allowing it an additional 90 days to file its opening brief. But we largely denied the Agency's third request for an extension of time, extending the due date in Case No. A-13598 by only 39 days, to match the due date in Donnelly's other appeal. Thus, Donnelly's opening brief in Case No. A-13598 is now also due on November 5, 2021 — 519 days after the original filing

deadline.

In response to our orders denying, in whole or in part, the Agency's third requests for extensions of time to file the opening briefs in these cases, the Agency filed a motion to withdraw from its representation of Donnelly. In its motion, the Agency asserts that it does not have the resources to comply with the briefing deadline in these cases and also provide effective representation to Donnelly and its other clients. According to the Agency, if the briefing deadline remains in place, there is a significant risk that its representation of one or more clients will be materially limited by its responsibilities to Donnelly — that is, the Agency will have a concurrent conflict of interest under Alaska Rule of Professional Conduct 1.7(a)(2). It therefore asks this Court to permit the Agency to withdraw from its representation of Donnelly in these cases, if the briefing deadline is not otherwise extended.

The State opposes the Agency's motion to withdraw.[1]

Several courts have recognized that the caseload of a public defender may become so excessive that a conflict of interest is created.[2] We acknowledge that the Agency's pleadings indicate that it has experienced a significantly increased number of

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[1] We invited the Office of Public Advocacy (OPA) — the agency responsible for assuming representation of a criminal defendant when the Public Defender Agency has a conflict of interest — to respond. OPA does not take a formal position on the motion to withdraw, but rather argues that we should grant the Agency's extension request. OPA further contends that, if the Agency is allowed to withdraw, this Court should appoint counsel under Administrative Rule 12(e) rather than transfer the case to OPA.

[2] *See, e.g.*, *In re Ord. on Prosecution of Crim. Appeals by the Tenth Jud. Cir. Pub. Def.*, 561 So.2d 1130, 1135 (Fla. 1990); *U.S. ex rel. Green v. Washington*, 917 F.Supp. 1238, 1275 (N.D. Ill. 1996).

child-in-need-of-aid appeals this calendar year, and we also acknowledge that these appeals must be handled on an expedited basis.[3] It appears that this increase in child-in-need-of-aid appeals has resulted in a concomitantly sizeable increase in requests for extensions beyond Standing Order No. 12 and has exacerbated what was already an intractable problem with respect to briefing delays in the Agency's criminal appeals.[4] However, even if the Agency's current workload renders it unable to provide effective representation to all its appellate clients — an assertion the State disputes[5] — we are unwilling to grant it the relief the Agency requests in these cases.

Our decision is driven by two primary concerns. First, we agree with those courts that have concluded that the problem of excessive caseload in a public defender office should be resolved at the outset of representation, rather than at some later point in the proceeding.[6] In the present case, Donnelly's appeals have been pending for over 500 days. We presume that the Agency has an established attorney-client relationship with Donnelly and that it has at least a general understanding of the record and the issues

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[3] Alaska R. App. P. 218(a)(3) & (h).

[4] We acknowledge the progress the Agency has made in the last year on reducing its lengthy criminal appellate backlog. We also acknowledge that the Agency's appellate attorneys produce high quality briefing that is of great value to this Court. But in spite of this, we conclude that the delay in this case is excessive.

[5] The State questions whether the Agency's briefing delays are solely the result of an excessive caseload. For the reasons stated, we need not resolve that question in this case. We note, however, that resolution of such a factual dispute would require an evidentiary hearing and would not be resolved simply by weighing the parties' competing assertions.

[6] *See, e.g.*, *Pub. Def., Eleventh Jud. Cir. of Fla. v. State*, 115 So.3d 261, 270 (Fla. 2013); *Escambia Cnty. v. Behr*, *384 So.2d 147, 150* (Fla. 1980) (England, C.J., concurring).

that are presented by this appeal. If we permit the Agency to withdraw, Donnelly's new attorney would have to re-do the work that Agency has already completed, and the filing of Donnelly's appeal would be delayed even further.[7]

Indeed, we question whether it is the Agency's representation of Donnelly in these cases that is causing it to choose between the rights of its various clients. The Agency asserts that its conflict of interest developed only recently — when this Court denied its motions for an extension of time to file the opening briefs — and that this Court can avert the conflict by extending the deadline, as it had requested. But if this is the case, the Agency can similarly avert the conflict by seeking relief in its newer cases. Moreover, the affidavits that accompanied the extension requests in this case indicated that, at the time of the requested extensions, the assigned attorney was completing the opening brief in *Sadowski v. State*, Case No. A-13445, and that the attorney would then begin working on these cases. Since the opening brief in *Sadowski* has now been filed, we assume that the Agency is currently prioritizing the briefs in Donnelly's cases.

Our second concern is that the Agency's claimed conflict of interest apparently implicates a large number of the Agency's cases. Where a defense agency is experiencing a system-wide inability to provide effective representation to its clients, courts should not address the problem piecemeal, on a case-by-case basis. A piecemeal

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[7] The Agency asserts that, by denying the requested extensions, this Court may be causing Donnelly stress and uncertainty. But the Agency does not indicate that it has spoken with Donnelly about the briefing extensions and does not claim to know Donnelly's position on this matter. Certainly, further delay is unlikely to benefit Donnelly. Moreover, if Donnelly is experiencing stress, there is no reason to believe that the cause of this stress is this Court's enforcement of its published briefing deadlines, rather than the Agency's briefing delays.

approach "wastes judicial resources on redundant inquiries"[8] and may clog the courts with myriad individual motions to withdraw. Indeed, the cases cited by the Agency in support of the premise that an excessive caseload can cause a conflict of interest generally involved broad-based orders that applied to a class of cases, rather than orders appointing conflict counsel for a single defendant.[9] In those cases, the courts recognized judges' inherent authority and responsibility to manage their dockets in a way that reduces delay, respects the statutory and ethical obligations of defense attorneys, and protects both the public and the constitutional and statutory rights of defendants.[10]

In short, we decline to allow the Agency to obtain over a year and a half of briefing extensions, and then be permitted to withdraw when an additional extension request is denied. Such a system would effectively authorize endless briefing extensions and lead to unacceptable appellate delay.

Upon consideration of the Public Defender Agency's motion to withdraw from Donnelly's appeals, the State's opposition, and the response filed by the Office of Public Advocacy, the motion to withdraw or extend time is DENIED.

Entered at the direction of the Court.

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[8] *Pub. Def., Eleventh Jud. Cir. of Fla.*, 115 So.3d at 274.

[9] *See State ex rel. Missouri Pub. Def. Com'n v. Waters*, 370 S.W.3d 592 (Mo. 2012); *Pub. Def., Eleventh Jud. Cir. of Fla.*, 115 So.3d 261; *see also U.S. ex rel. Green v. Washington*, 917 F.Supp. 1238 (N.D. Ill. 1996); *In re Ord. on Prosecution of Crim. Appeals by the Tenth Jud. Cir. Pub. Def.*, 561 So.2d 1130 (Fla. 1990).

[10] *State ex rel. Missouri Pub. Def. Com'n*, 370 S.W.3d at 598; *Pub. Def., Eleventh Jud. Cir. of Fla.*, 115 So.3d at 281.

Wollenberg, J., dissenting in part.

I agree with the Court's decision denying the Agency's motion to withdraw. I also agree with the principles articulated in the lead order. I fail to see how withdrawing from two appeals that have been pending for over 500 days serves Carlton Donnelly, or systemically addresses the problem of appellate delay.

That said, the pleadings suggest that the Public Defender Agency has made significant progress in the last year in reducing its criminal appellate backlog. According to the statistics provided by the Agency, between 2017 and early 2020, the Agency's criminal appellate backlog grew exponentially — from 17 cases to over 120 cases. Since then, under the leadership of a new appellate supervisor, the Agency has apparently cut that backlog by more than half.

This calendar year, the Agency has had a significant influx of child-in-need-of-aid appeals. According to the Agency's motion to withdraw, it assigned 24 child welfare appeals to staff attorneys between January 1 and October 15. If the child-in-need of aid appeals continue at that rate, the Agency will have 30 child-in-need-of-aid appeals by the end of this year — a historically high number. It is not surprising that, as a result of those appeals, the Agency has had even greater difficulty meeting its deadlines in its criminal appeals.

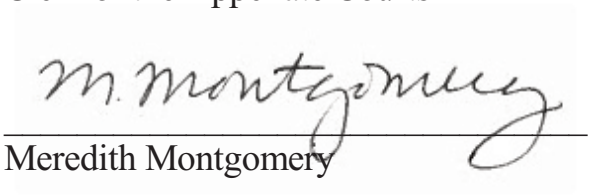
There is no easy answer to the problem of appellate delay. Denying extension requests puts incredible stress on individual attorneys, who are not the source of the Agency's backlog. But granting the requests reduces the pressure of a deadline, provides little incentive for the allocation of additional resources, and ultimately, does not advance our common goal of reducing appellate delay.

The Court's frustration in these particular cases stemmed largely from the lack of *any* apparent progress in these appeals at the time of the most recent requested extensions, or any recognition of how long the cases had been pending without even a cursory review of the record and tentative identification of issues that could allow an attorney to give a realistic sense of how long the briefs might take. Given the prior extensions beyond Standing Order No. 12 that we had already granted, it was surprising to see so little explanation offered for why those extension requests had so missed the mark. If the appellate delay in these cases is indeed an Agency problem, one would expect to see in the extension requests the kind information the Agency only later included in its motion to withdraw.

Since we denied the extension requests in these cases, however, the Agency appears to have dedicated increased funding to appellate contracting. Currently before the Court are motions in at least nine criminal appeals, in which the Agency has identified an outside attorney with whom it plans to contract. In its motion to withdraw from Donnelly's appeals, the Agency notes that the appeals that remain to be handled by staff attorneys — after other appeals have been contracted — tend to have more substantial records.

Given the increased resource allocation to appellate contracts, the downward trajectory of the backlog, and our recognition in this case of the diligence of the assigned attorney, I would grant the extensions requested in this case, but order no further extensions. I note, however, that I would be unlikely to grant future extension requests of this nature and would also consider sanctions against the Agency for failing to meet future briefing deadlines.

Clerk of the Appellate Courts



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